

The claimant was hired by respondent to perform the job duties of a concrete finisher. On his first day of work on June 9, 2003, while grading a basement floor, the claimant backed into a conveyor belt. When claimant turned to see what he had backed into he twisted and felt pain in his back.

Claimant testified that he immediately told a co-worker, Mark Hoover, that he had twisted his back. Claimant completed the workday but testified that his supervisor, John Jenkins, drove him to another work site that day and that while there claimant told his supervisor that he had done something to his back.

Claimant testified that his back tightened up and became sore during the night. Consequently, claimant called his supervisor and left messages that he would not be able to work the next day. Claimant testified that he talked to David Hughes, respondent's owner, on Wednesday. Claimant testified that he told Mr. Hughes that his back was sore and messed up and that was the reason he could not work on Tuesday. Claimant further testified that he was asked whether he was going to be able to do the work and he answered he would. Claimant was directed to call his supervisor and arrange to be picked up for work on Thursday.

Claimant testified that he went to work Thursday and as he was pushing freshly poured concrete he experienced pain in his lower back which he described as feeling like two water balloons popping. Claimant testified that Mr. Hoover noticed that he looked like he was hurt. Claimant testified that he told his supervisor, Mr. Jenkins, that something bad had happened. As claimant rode with his supervisor to another work site he continued to tell his supervisor that his back hurt and something wasn't right. Claimant testified he told his supervisor he could not do any further work.

Claimant called his doctor and was provided a prescription and told not to return to work until diagnostic testing could be performed. Claimant testified he called his supervisor and told him what the doctor had said and further requested his pay so that he could obtain his prescription at the drug store. Claimant had a friend drive him to pick up his paycheck. Claimant noted that his back was so stiff he could barely get out of the car to walk to where his supervisor was in order to get his paycheck.

David Hughes, respondent's owner, testified that on June 9, 2003, he was at the work site with claimant and was never told, by claimant or claimant's supervisor, that claimant had been injured. On the following day claimant left a message on Mr. Hughes' answering machine. Claimant indicated in the message that he had not worked for some time and was out of shape and wanted the day off to take it easy. Mr. Hughes called claimant that day and was told the same thing but Mr. Hughes noted claimant never said he was hurt at work. On Wednesday, the claimant returned to work and Mr. Hughes noted that claimant did not appear to be injured and never said he had been injured.

John R. Jenkins, II, testified that claimant never told him he suffered an injury at work at any time. Mr. Jenkins further testified that as they worked together the claimant did not appear to be injured. Mr. Jenkins agreed that claimant called on Friday and wanted to pick up his check but claimant did not say that he was hurt.

Mark Hoover testified that he worked with claimant on Monday, June 9, 2003, and claimant never said he was injured nor did he appear to be injured. Mr. Hoover testified that he worked with claimant on Wednesday and claimant never said he was injured that day nor did he appear injured. Mr. Hoover next saw claimant when he came to pick up his check on Friday. Mr. Hoover testified that claimant never said he had been hurt and did not appear to be injured.

The Workers Compensation Act places the burden of proof upon claimant to establish his right to an award of compensation and to prove the conditions on which that right depends.¹ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²

The injured worker is required to give the employer notice of accident, within 10 days after the date of a work-related accident, or establish just cause for not giving the employer the 10-day notice within 75 days.³ Here, the claimant contends that he proved through his testimony he gave respondent immediate notice of both his June 9th and 11th accidents, by notifying his supervisor as well as respondent's owner of the accidents within the required 10 days.

But all of the respondent's representatives, whom claimant alleged he notified that he hurt his back at work, disputed claimant's testimony. The Board finds that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representatives testify in person. In denying claimant's request for medical treatment and temporary total disability benefits, the ALJ apparently believed their testimony over the claimant's testimony. The Board concludes that some deference may be given to the ALJ's findings and conclusions because he was able to judge the witnesses' credibility by personally observing them testify. Therefore, the Board concludes, for preliminary hearing purposes, that claimant failed to give respondent timely notice of either his June 9 or June 11, 2003 accidents.

¹ K.S.A. 44-501(a); see also *Chandler v. Central Oil Corp.*, 253 Kan. 50, 853 P.2d 649 (1993) and *Box v. Cessna Aircraft Co.*, 236 Kan. 237, 689 P.2d 871 (1984).

² K.S.A. 2002 Supp. 44-508(g). See also *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ See K.S.A. 44-520 (Furse 2000).

The comments made by the ALJ in his October 13, 2003 Preliminary Decision clearly reflect that, after considering claimant's testimony and that of the other witnesses, the Judge found claimant's credibility to be lacking. The ALJ also found claimant had failed to prove by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment with respondent on the dates alleged. The Board's review of the record suggests it is reasonable to rely on the ALJ's determination of credibility in this case and concludes the claimant did not prove he suffered accidental injury arising out of and in the course of his employment. Accordingly, the Preliminary Decision should be affirmed.

WHEREFORE, it is the finding of the Board that the Preliminary Decision of Administrative Law Judge Robert H. Foerschler dated October 13, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December 2003.

BOARD MEMBER

c: Michael J. Haight, Attorney for Claimant
Lynn M. Curtis, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Anne Haught, Acting Workers Compensation Director